SABABUMI (SANDAKAN) SDN. BHD.

v.

DATUK YAP PAK LEONG (SUED PURSUANT TO S. 9(C) OF THE SOCIETIES ACT, 1966 IN HIS CAPACITY AS THE CHAIRMAN OF THE KELAB LUMBA KUDA SANDAKAN)

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN IAN HC CHIN J
[ORIGINATING SUMMONS NO. K24-26 OF 1995]
15 APRIL 1995

CONTRACT: *Defendant granted licence to conduct gaming activities at turf club - Licence granted under the provisions of the Gaming Ordinance of Sabah - Defendant entering into written agreement with plaintiff - Plaintiff agreeing to build and maintain turf club for defendant in return for rights to the proceeds of the gaming activities carried out at the club - Gaming Ordinance of Sabah repealed and defendant's licence cancelled - Defendant granted new licence under the Pool Betting Act 1967 - Whether plaintiff's agreement with defendant terminated on the repeal of the Gaming Ordinance - Whether the agreement is in subsistence as long as the defendant has a valid licence - Whether defendant in breach of the agreement - Whether plaintiff entitled to injunction to prevent continuing breach.*

The plaintiff agreed to construct a racecourse for the defendant in return for the revenue from the gambling activities to be carried out in conjunction with the races to be held at the racecourse. The defendant's exemption from the provisions of the Gaming Ordinance (the Ordinance) was cancelled and the defendant was granted a new licence under the provisions of the Pool Betting Act 1967 (the Act). The defendant claimed that the licence issued under the provision of the Pool Betting Act was not covered by the agreement entered into between the plaintiff and the defendant.

The plaintiff sought a declaration that the licence issued by the relevant authorities is within the scope of the agreement and argued that the exclusive right granted to the plaintiff under the agreement was only to come to an end if and when the defendant itself ceases to have the right or licence to conduct and manage such gaming activities.

The question that arose for decision on the construction of the agreement was whether a term could be implied into the agreement that the plaintiff's right was only to come to an end if and when the defendant itself ceases to have the right or licence to conduct and manage gambling activities. The further questions that arose were whether there was any express term in the agreement prohibiting the imposition of an implied term and whether the plaintiff was entitled to an injunction to stop any further breaches of the agreement by the defendant.

Held:

[1] The approach to be adopted in construing an agreement is that the parties cannot themselves give direct evidence of what their intention was. In construing any written agreement the Court is entitled to look at evidence of the objective factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and, objectively, the "aim" of the transaction; however, this does not entitle the Court to look at evidence of the parties' subjective intentions.

[2] On the question of whether there is any express term in the agreement prohibiting the importation of an implied term, the issue is not whether the word "licence" used in the

agreement linguistically includes a licence issued under the Act but rather, whether the agreement made provision for the eventuality of the licence under the Ordinance being cancelled and then replaced by one under the Act. It does not appear from the agreement that the parties have reduced into writing what the position would be in such eventuality as had happened. Since there is no such express provision, the question of an express provision prohibiting the importation of an implied term does not arise.

[3] In the circumstances of the present case it was necessary to imply a term that as long as the defendant is licenced, under whatever legislation it may be, the plaintiff will have the exclusive right to manage and conduct the on-course and off-course betting for at least 20 years, in order to give business efficacy to the agreement entered into between the parties. Consequently the plaintiff was entitled to the declaration that the licence dated January 1995 and issued by the Finance Minister of the Government of Malaysia to the plaintiff under the Pool Betting Act 1967, and any renewals thereof, is within the scope of the agreement made between the plaintiff and the defendant dated 26 November 1987.

[4] The plaintiffs application for an injunction to prevent the continuing breach of the agreement by the defendant must be refused. It can be accepted that generally, the culture of all the races in Malaysia eschew gaming. Therefore, the, Court must not do anything that can be interpreted as sanctioning or approving gaming. The granting of an injunction may convey that impression. Furthermore the damages to the plaintiff are easily quantifiable as accounts must be kept of every single bet for the purpose of payment of government taxes and it is from these figures that whatever damages that are payable can be computed. Another reason for refusing the injunction is that the agents appointed by the defendant had obtained the prior approval of the Finance Minister. An injunction may appear to dictate to the Finance Minister how his discretion ought to be exercised and this the Court will not do.

[Orders accordingly]

Cases referred to:
Schuler (L) AG v. Wickman Machine Tool Sales Ltd. [1974] AC 235 ***(refd)***
Reardon-Smith Line Ltd. v. Hansen-Tangen [1976] 1 WLR 989 ***(refd)***
Reigate v. Union Manufacturing Company (Ramsbotton), Limited and Elton Cop Dyeing Company, Limited [1918] 1 KB 592 ***(refd)***
Shirlaw v. Southern Foundries [1926] Limited [1936] 206 ***(refd)***
James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd. [1970] ALL ER 796 ***(refd)***
Kassim bin Sulong & Anor. v. Guthrie Estates Holdings Ltd. & Ors. [1993] 3 MLJ 303 ***(refd)***
Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board [1973] 2 ALL ER 260 ***(dist)***
Yap Nyo Nyok v. Bath Pharmacy Sdn. Bhd. [1993] 2 MLJ 250 ***(dist)***
Smith v. Harwich (Mayor) [1857] 2 CB (NS) 651 ***(refd)***
Southern Foundries [1926], Ltd v. Shirlaw [1939] 2 KB 206 ***(refd)***
*Stirling v. Maitland 5 B & S 840****(cit)***
Lynch v. Thorne [1956] 1 All ER 744 ***(dist)***
In re Railway and Electric Appliances Company [1888] 38 Ch D 597 ***(refd)***
Tindok Besar Estate Sdn. Bhd. v. Tinjar Company [1979] 2 MLJ 229 ***(dist)***

Legislation referred to:
Evidence Act 1950, ss. 92 & 94
Gaming Ordinance (Cap. 50), s. 27(a) & (b)
Modification of Laws (Common Gaming Houses Lotteries, Betting and Sweepstakes Duties and Racing (Totalisator Board) (Extension to the States of Sabah and Sarawak) Order 1991, O. 12
Pool Betting Act, 1967
Societies Act, 1966

Other sources referred to:
Norton on Deeds, 2nd Edn., 1928, p. 50
Halsbury's Laws of England, 4th Edn., Vol. 9., para. 356
Interpretation of Contracts, Lewison, p. 44, para. 2.10
Chitty on Contracts, 26th Edn., para. 1681

For the plaintiff - Roderic Fernandez; M/s. Shelley Yap Leong Tseu Chong Chia & Company
For the defendant - Valentine Willie; M/s. Skinner Lind Willie Wong & Chin

JUDGMENT

Ian H.C. Chin J:

Introduction

This is an action by Sababumi (Sandakan) Sdn. Bhd. ("Sababumi") against the Sandakan Turf Club ("the Club") in respect of, what is virtually, the right to millions of dollars that keep and will keep rolling in for years to come from the bets of punters in Sabah whose dream of striking it rich also spun a web which the punters, blind to the odds they face, would be entrapped to bet again and again in the eternal hope of realising that dream. Thus, the till of the one who has the legal right to organise the gaming rings daily with a continuous stream of ringgit. The tussle in this case is the right to that till and the ownership of that right depends on the construction to be given to an agreement which the parties have signed. I will now proceed to set out the facts of this case.

Facts of Case

On 25 November 1983, the Club was registered under the Societies Act, 1966. Just less than three months later, on 14 February 1984, the Club was exempted from the provisions of the Gaming Ordinance (Cap. 50) ("Ordinance") pursuant to s. 27(a) thereof and this has the effect of allowing the Club to carry out gaming activities in the like of totalisator or pari mutuel, an on-course betting, which was otherwise prohibited by the Ordinance. On the same day as well and in pursuant to s. 27(b), the Club was given a licence "to promote and organise public lotteries (including sweepstakes, 3-digit numbers, 4-digit numbers) in any part of Sabah upon the following terms and conditions:

(1) the said public lotteries shall only be promoted and organised in conjunction with race meetings held by the Club;

(2) tickets for the said public lotteries may be sold on days other than those on which race meetings are held;

(3) tickets for the said public lotteries may be sold by the Club through persons employed by the Club or through agents duly appointed by the Club;

(4) tickets for the said public lotteries may be sold in any part of Sabah; and

(5) any prize money not claimed within one month from the date of drawing of the public lottery to which the prize money relates shall be forfeited and disposed off by the Club at the Club's discretion.

Undoubtedly, discussion and negotiations must have taken place before the Club and Sababumi entered into the Agreement dated 26 November 1987, ("the Agreement"), but nothing was said about them. What was revealed was that the Club was financially unable to construct a modern racecourse. It was nearly four years after they were issued the said exemption and licence that the Club entered into the Agreement, the preamble of which states,

inter alia, that the Club and Sababumi have agreed to co-operate in the construction of the race course, the management of the racing facilities and the setting up of the betting facilities. Since argument was advanced touching on the preamble of this Agreement, the preamble is reproduced here:

> WHEREAS the Club intends to acquire a piece of land in the District of Sandakan for the setting up of a race course with racing and betting facilities.
>
> AND WHEREAS the Club has been granted exemption from the provisions of the Gaming Ordinance Cap. 50 by the relevant authority in respect of any totalisator or pari mutuel to be promoted or operated by it on the proposed Race Course (hereinafter referred to as 'the said Exemption').
>
> AND WHEREAS the Club has also been granted the necessary licence to promote and organize public lotteries (including sweepstakes 3-D and 4-D) in any part of Sabah under the Gaming Ordinance Cap. 50 Sabah (hereinafter referred to as 'the said Licence').
>
> AND WHEREAS the Parties hereto have agreed to co-operate in the construction of the race course and the management of racing facilities in Sandakan and the setting up of the betting facilities in accordance with the terms and conditions hereinafter provided.

As for the terms of the Agreement, the obligations imposed by the Agreement on Sababumi can be summarised this way:

(1) to purchase 100 acres of land for the Club;

(2) to construct thereon a race course;

(3) to set up on-course and off-course betting machines;

(4) to manage and maintain the race course, including the buildings, and the betting machines;

(5) to conduct the races; and

(6) to pay the Club 2% of all bets received.

In return, the Club agreed:

(1) to grant Sababumi the exclusive right to run the races;

(2) to grant Sababumi the exclusive right to conduct and manage all bettings;

(3) to sublet the said 100 acres of land to Sababumi for 20 years at the nominal annual rent of RM1 to commence from the date of completion of the race course, at the end of which period, everything on the land and the betting machines would go to the Club free of charge.

The relevant provisions of the Agreement that had been referred to are:

> 11.(1) If the said Exemption granted to the Club under the Gaming Ordinance is cancelled by the Authority concerned due to no fault of either the Club or the Company, then this Agreement shall be determined forthwith. If this event happens after the Company has been in operation of the race course and betting facilities for ten (10) years or more, then the said Land together with the race course and all building structures and fixture thereon, together with all on-course and off-course betting machines, and all other amenities and facilities forming part of the race course and racing and betting facilities shall revert back to the Club as is sole properties and the Company shall have no claim whatsoever against the Club for capital outlays expended by the Company on the race course and the betting facilities. If this event happens after the Company has been in operation of

the race course and betting facilities for less than (10) years then the Parties shall negotiate for the take over of the said Land and the race course and all betting facilities with the view of fair compensation to the Company for the loss of the capital outlay. If negotiation should break down then this matter shall be submitted to arbitration in accordance with the laws for the time being in force in Sabah.

(ii) However, if the said Licence issued to the Club under the Gaming Ordinance is cancelled by the parties concerned due to no fault of either the Club or the Company, in such event the Company shall still be entitled to operate and manage the ponies and [thoroughbred] horses racing on the race course as permitted under the said Exemption and in accordance with the terms and conditions of this Agreement which are applicable thereto

12.(i) If the said Exemption is cancelled because of the fault of the Club, than this Agreement shall be determined forthwith and upon such determination the Club shall compensate the Company for the loss of capital outlays expended in the race course and betting facilities.

(ii) If only the said Licence is cancelled because of the fault of the Club, then this Agreement shall still subsist and be valid and binding upon the parties in so far as the same relates to the operation and management of the ponies and [thoroughbred] horses racing on the race course provided however that in such event the Club shall compensate the Company for the loss of capital outlays expended on the race course and betting facilities.

13.(i) If the said Exemption is cancelled because of the fault of the Company, then this Agreement shall be determined forthwith and upon such determination the said Land together with the race course and all building, structures and fixtures thereon, together with all the on-course and off-course betting machines and all other amenities and facilities forming part of the race course and racing and betting facilities shall revert back to the Club as its sole properties.

(ii) If only the said Licence is cancelled because of the fault of the Company, then this Agreement shall still subsist and be valid and binding upon the parties in so far as the same relates to the operation and management of the ponies and [thoroughbred] horses racing on the race course provided however the Company shall compensate the Club the amount equivalent to the prevailing market value of the buildings, structures and fixtures on the race course, together with all on-course and off-course betting machines and all other amenities and facilities forming part of the race course and racing and betting facilities. Such valuation shall be based upon a valuation carried out by a chartered valuer to be agreed by the parties hereto.

It was after the Agreement was executed that 120 agents were appointed throughout Sabah. Sababumi, pursuant to the Agreement, proceeded to construct the race course with a grand-stand, stables and its related amenities for horse racing. Machines for both on-course and off-course betting were also installed. Though supposedly without disagreement as to the facts, the parties are at odd as to how much was spent by Sababumi on the said construction works and as to whether Sababumi did suffer a loss in the betting operations between the years 1987 and 1991. In any event, Mr. Roderic Fernandez, Counsel for Sababumi, and Mr. Valentine Willie, Counsel for the Club, at the outset, in response to my question as to whether there was any dispute as to the facts, agreed that where there are conflict in the affidavit evidence, they are to be disregarded as being irrelevant to the issue to be decided. Though there was disagreement as to the figures, it is not disputed that substantial sum of money was expended by Sababumi for the construction of the race course and its related structures and though they were not up to the standard which the Club wished were nevertheless good enough to enable races to run on the course from 1989. On-course and off-course betting

machines were also set up by Sababumi. The cash income for the Club, under the Agreement, was 2% of the gross taking of the bets placed by the punters. It seems nothing eventful occurred thereafter until 14 April 1992, when the following documents emanated, *viz*.:

The Gaming Ordinance

(Cap. 50)

Amended Licence to Promote and Organise Public Lotteries

In exercise of the powers conferred upon him by s. 27(b) of the Gaming Ordinance (Cap. 50) the Yang di-Pertua Negeri by this licence hereby authorise the Sandakan Turf Club (hereinafter called 'the Licensee') to promote and organise public lotteries to wit, sweepstakes, lotto and 4-digit numbers in any part of Sabah upon the following terms and conditions:

(1) the said public lotteries shall only be promoted and organised in conjunction with pony- or horse-racing held by the Licensee at its racecourse in Sandakan;

(2) the total number of draws for the said public lotteries shall be limited to not more than three (3) draws per week to be drawn on such days as may be specified in the prospectus;

(3) tickets or chances in the said public lotteries may be sold on other days in addition to the days of the draw;

(4) tickets or chances in the said public lotteries may only be sold or distributed by the Licensee by any person employed by the Licensee or through agents duly appointed by the Licensee:

Provided that no agent shall be appointed by the Licensee to sell or distribute tickets or chances in the said public lotteries without the prior approval of the State Government which shall have the sole discretion to decide on the number of agents to be appointed and the criteria for such appointment;

(5) tickets or chances in the said public lotteries may be sold or distributed in any part of Sabah;

(6) the Licensee shall, before the commencement of the sale of tickets or chances for any of the said public lotteries, obtain the approval by the State Government of a prospectus for the said public lottery setting forth the following:

(a) the prizes offered therein;

(b) the number of tickets or chances therein to be offered for sale and prices and denominations of such ticket or chances;

(c) the opening and closing dates for the sale of tickets or chances therein;

(d) the days, places and manner of the determination of the winners of prizes therein; and

(e) the conditions subject to which any tickets or chances therein will be offered for sale and in accordance with which the said public lottery will be conducted:

Provided that the prospectus for any of the said public lotteries the sale of which had commenced before the issue of this licence shall be submitted to the State Government for approval within two (2) months from the date of the issue of this licence.

(7) the approved prospectus of each of the said public lotteries shall be deemed to be part of these terms and conditions as if the same were incorporated herein and shall not be varied or amended without the approval of the State Government;

(8) Subject to the Unclaimed Moneys Act 1965 (Act 370), any prize money for any public lottery not claimed by the winner within 30 days from the date of draw of such public lottery shall be forfeited and paid to the Licensee to be disposed of in such manner as the Licensee may deem fit;

(9) this licence shall be personal to the Licensee and shall not be transferable in any manner whatsoever; and

(10) this licence shall supersede the licence dated 14 February 1984 issued to the Licensee which is hereby cancelled with immediate effect.

Dated at Kota Kinabalu this 14 April 1992.

By His Excellency's Command.

(Signed)
(Datuk Joseph Pairin Kitingan)
Chief Minister Sabah.

A day after this later licence, *supra*, was issued, the Ordinance was repealed by the Modification of Laws (Common Gaming Houses Lotteries, Betting and Sweepstakes Duties and Racing (Totalisator Board) (Extension to the States of Sabah and Sarawak) Order 1991 but the exemption and the later licence was saved by O. 12 which gives the exemption and the later licence continued force until their expiry or revocation under the Ordinance. Things continue to be uneventful until the Club's advocates letter dated 7 January 1994, to Sababumi, coming more than two years after the amended licence was issued, to say:

Amended Licence To Promote and

Organise Public Lotteries

We act at the instructions of Sandakan Turf Club and we refer to the Agreement dated 26 November 1987 which your company entered into with our clients under which the right to operate 4D lotteries under the Licence to Promote and Organise Public Lotteries dated 14 February 1984 was given to your company. As you are aware, this licence has been cancelled and superseded by the Amended Licence To Promote and Organize Public Lotteries dated 14 April 1992.

In view of the amendment and new conditions stipulated in the Amended Licence it is necessary to review the terms of the Agreement dated 26 November 1987. Under cl. 11(ii) of the Agreement once the licence is cancelled, Sababumi can no longer carry on the 4D lotteries but only the horse racing activity. Further under the Amended Licence which provides that it shall not be transferable in any manner, the grant of the exclusive right to conduct and manage 4D lotteries is no longer possible as such exclusive grant will divest the licencee of its rights and hence amounts to a transfer of the rights under the Amended Licence.

Our clients' main concern is that there should be no infringement of the Amended Licence whatsoever. It is suggested therefore that both our clients and your company take immediate steps to resolve the problems.

This brought about the reply of Sababumi dated 14 January 1994, maintaining that the Agreement remains in full force. The letter further asserts that the Club was trying to coerce Sababumi to agreeing to a deal by the Club with a third party to operate Lotto and Sweepstakes lotteries in Sabah. Save for the exchange of the letters, nothing else happened. Sababumi continued to run the on-course and off-course bettings. A period of calm then followed though there were complaints by the Club that the race track was unsatisfactory. The storm threatened to break in the wake of a letter dated 12 December 1994, from the Finance Ministry to the Club which says:

12 Disember 1994

Sandakan Turf Club,

.....
Pembatalan "Licence to Promote and
Organise Public Lotteries" Di bawah
Ordinan Judi (Bab 50) Negeri Sabah

Saya adalah diarah merujuk perkara tersebut di atas.

2. Adalah dimaklumkan bahawa pada menjalankan kuasa-kuasa yang diberi oleh seksyen 27(b) Ordinan Judi (Bab 50), Menteri Kewangan dengan ini membatalkan "Licence to Promote and Organise Public Lotteries" yang telah dikeluarkan kepada Sandakan Turf Club pada 14 April 1992. Pembatalan ini akan berkuatkuasa pada 01 Januari 1995. Dengan tindakan tersebut, Sandakan Turf Club adalah berhak untuk hanya menjalankan aktiviti perjudiannya sehingga 31 Disember 1994.

3. Sehubungan dengan perkara ini adalah dimaklumkan bahawa Kerajaan telah pun memperluaskan pemakaian Akta Rumah Perjudian Terbuka 1953, Akta Loteri 1952, Ordinan Petaruhan 1953, Akta Duti Pertaruhan dan Ambilitagan 1948 dan Akta Lumba Kuda (Lembaga Totalisator) (Perluasan ke Negeri-Negeri Sabah dan Sarawak) 1991 (PU(A) 377). Perintah tersebut telah mula berkuatkuasa pada 15 April 1992. Oleh yang demikian, selepas 01 Januari 1995 aktivit-aktiviti perjudian Sandakan Turf Club adalah tertakluk kepada kawalan Akta-Akta tersebut. Di dalam hal ini, sekiranya Sandakan Turf Club bercadang untuk meneruskan aktiviti-aktiviti perjudiannya, Sandakan Turf Club perlulah mempunyai lesen-lesen yang berkaitan di bawah Akta-Akta tersebut.

4. Adalah dimaklumkan bahawa Kerajaan perlu mengambil tindakan tersebut di atas bagi mempastikan bahawa kawalan aktiviti-aktiviti perjudian dapat diselaraskan di seluruh negara.

(Signed)
.....
Setiausaha Bahagian Pentadbiran,
b.p. Ketua Setiausaha Perbendaharaan.

In short, the just reproduced letter conveyed the decision of the Finance Minister to cancel the later licence issued to the Club on 14 April 1992 and it informed the Club that all gambling activities of the Club was allowed to continue up to 31 December 1994. The letter went on to inform the Club that the government had extended the application of the various laws to Sabah and Sarawak and that the Club must possess a licence under the said extended laws if the Club wished to continue the gaming activities. The letter ended by saying that the course of action taken by the government was to ensure uniform control of the gambling activities throughout the country. A meeting then took place in Kota Kinabalu between representatives of the Finance Ministry and the Club but the Court is not told what transpired at this meeting. Subsequently, the Club wrote to the Finance Ministry on 17 December 1994, and applied for a new licence under the Pool Betting Act, 1967, to continue all its previous activities without disruption from 1 January 1994. The Club in that letter also applied for the approval of its scheme and arrangement which were, according to the Club, the same ones then being used under the then later licence. It was after this that on 24 December 1994, the Club wrote to Sababumi to say:

> I have to inform you that the Licence dated 14 April 1992 under The Gaming Ordinance Cap. 50 under which you claimed the right to operate the 4-D public lottery has been cancelled with effect from 31 December 1994 by the Ministry of Finance.

The exemptions CMDC 202/51 dated 14 February 1984 under The Gaming Ordinance (Cap. 50) in respect totalisator (for horse/pony racing) has not been cancelled and remains operative.

On date unknown, the Finance Minister issued the following licence under the Pool Betting Act, 1967, dated January 1995, to the Club, *viz.*:

PERB:KK/BP(J)/8.00/4/3/3-1JD.1(4)
Bayaran lesen: RM 250,000

Akta Pertaruhan Pool, 1967

Lesen

(Seksyen 5)

Lesen ini dikeluarkan oleh Menteri Kewangan, kemudian daripada ini disebut "Menteri", di bawah seksyen 5 Akta Pertaruhan Pool, 1967, kemudian daripada ini disebut "Akta 384", kepada Sandakan Turf Club, kemudian daripada ini disebut "pemegang lesen", yang mempunyai pejabat berdaftarnya di Tingkat 1, Blok A, Lot No. 3, Bandar Tong Huat, North Road, Sandakan, Sabah, bagi maksud memungut, mengendali atau memajukan pertaruhan pool iaitu pertaruhan pool telahan Empat Nombor (4D) tertakluk kepada seksyen-seksyen 10, 16, 17 dan 28 Akta 384 dan syarat-syarat dan sekatan-sekatan seperti yang ditetapkan di dalam lesen ini.

Syarat-Syarat Dan Sekatan-Sekatan

1. Lesen ini adalah sah bagi tempoh satu (1) tahun kalendar bermula dari 1 Januari 1995 dan hendaklan hanya berkuatkuasa di Negeri Sabah sahaja.

2. Premis pemegang lesen adalah di Sandakan Turf Club, Gelanggang Lumba Kuda, Jalan Sibuga, Sandakan, Sabah dan ianya tidak boleh diubah tanpa kelulusan Menteri.

3. Pemegang lesen hendaklah memperagakan suatu papan tanda yang nyata di suatu tempat yang muda dilihat di premis seperti yang ditetapkan di perenggan 2 lesen ini yang mempamer dan menunjukkan jenis perniagaannya.

4. Pemegang lesen hendaklah membayar fee bagi lesen ini mengikut kadar yang ditetapkan di bawah Peraturan-Peraturan (Fee Lesen) Pertaruhan Pool 1995.

5. Pemegang lesen hendaklan mendepositkan dengan Kerajaan sejumlah Ringgit Malaysia Satu Juta (RM1,000,000) dalam bentuk Bil Perbendaharaan atau Sekuriti Kerajaan yang diluluskan sebagai jaminan untuk wang yang dimenangi. Pemegang lesen hendaklah menyempurnakan suatu surat kuasa wakil tak boleh batal kepada Menteri yang memberi Menteri budicara mutlak untuk menjual atau melupuskan selainnya Bil Perbendaharaan atau Sekuriti Kerajaan yang diluluskan itu tanpa rujukan kepada pemegang lesen dan seterusnya menggunakan hasil darinya untuk membayar wang yang dimenangi yang gagal dibayar oleh pemegang lesen oleh kerana sesuatu pertikaian atau selainnya. Apa-apa amaun yang digunakan oleh Menteri hendaklah dibayar ganti oleh pemegang lesen dengan segera supaya amaun deposit dikekalkan pada jumlah Ringgit Malaysia Satu Juta (RM1,000,000) sepanjang masa.

6. Pemegang lesen hendaklah membayar cukai perjudian sebanyak 7% dan duti pertaruhann pool sebanyak 11.5% mengikut kadar yang ditetapkan oleh Menteri dari masa ke semasa, selain daripada pembayaran cukai-cukai pendapatan, syarikat, pembangunan dan lain-lain sepertimana yang dikehendaki oleh Undang-Undang yang berkaitan.

7. Pemegang lesen hendaklah mengemukakan, untuk kelulusan Menteri, Skim bagi setiap jenis pertaruhan pool dan variasi yang hendak dikendali atau dimajukan olehnya. Jenis pertaruhan pool dan variasi yang mana sesuatu Skim belum atau tidak diluluskan oleh Menteri tidaklah boleh dikendali atau dimajukan oleh pemegang lesen.

8. Menteri berhak menentukan bilangan dan masa cabutan diadakan dari masa ke semasa tertakluk kepada Skim jenis pertaruhan pool yang telah diluluskan olehnya.

9. Pemegang lesen hendaklah mengemukakan senarai dan btuir-butir agen yang dilantik olehnya untuk kelulusan Menteri. Agen-agen yang mana perlantikannya belum atau tidak diluluskan oleh Menteri tidak boleh beroperasi.

10. Pemegang lesen hendaklah hanya membenarkan agen-agennya menjalankan operasi mereka pada jam 10 pagi hingga 7 petang sahaja.

11. Pemegang lesen hendaklah menentukan bahawa agen-agennya mematuhi segala syarat dan sekatan yang ditetapkan oleh Menteri dari masa ke semasa.

12. Pemegang lesen hendaklah menyenggara dan menyediakan dengan kemaskini satu Buku Daftar yang mengandungi senarai agen-agen dan satu Buku Daftar yang mengandungi senarai pekerja-pekerja termasuk pekerja-pekerja agen-agennya mengikut butir-butir yang ditetapkan oleh yang Menteri dari masa ke semasa.

13. Pemegang lesen tidak boleh membenarkan mana-mana orang, selain dari pekerjanya atau pekerja agen-agennya, menjalankan apa-apa jua perniagaan berkaitan dengan pertaruhan pool tersebut di atas.

14. Pemegang lesen tidak boleh menjalankan apa-apa urusan kewangan berhubung dengan pertaruhan pool tersebut di atas kecuali di premis seperti yang dtetapkan di perenggan 2 lesen ini.

15. Pemegang lesen tidak boleh menjalankan apa-apa perniagaan atau aktiviti lain kecuali urusan berhubung dengan pertaruhan pool tersebut di atas di premis seperti yang ditetapkan di perenggan 2 lesen ini.

16. Pemegang lesen hanya boleh menjual tiket-tiket pertaruhan pool tersebut di atas di Negeri Sabah sahaja.

17. Pemegang lesen adalah bertanggungjawab sepenuhnya untuk membayar wang-wang yang dimenangi dan bukan agen-agennya.

18. Semua tiket yang dijual kepada orang awam hendaklah mengandungi perkataan-perkataan berikut:

    "JUDI ADALAH HARAM DI SISI AGAMA ISLAM"; DAN

    "SEMUA HADIAH DIJAMIN SEPENUHNYA"

    dan mempunyai tarikh dan masa penjualan tiket dibuat.

19. Pemegang lesen adalah juga tertaluk kepada Akta Wang Tak Dituntut 1965. Mana-mana wang yang tidak dituntut, sebagaimana ditetapkan di dalam Skim jenis pertaruhan pool yang berkenaan, hendaklah dimasukkan ke dalam hasil Kerajaan.

20. Pemegang lesen hendaklah membenarkan mana-mana pegawai awam yang telah diberi kuasa oleh Menteri dengan sewajarnya untuk memeriksa apa-apa akaun penyata pemegang atau agen-agennya.

21. Pemegang lesen hendaklah memberi, dalam masa yang ditetapkan, apa-apa penyata atau maklumat yang dikehendaki oleh mana-mana pegawai dari Perbendaharaan Malaysia seperti yang dinyatakan di dalam suatu notis bertulis yang dikeluarkan oleh pegawai tersebut.

22. Keanggotaan pemegang lesen atau badan pengurusannya tidak boleh ditukar atau diganti tanpa persetujuan Menteri.

23. Pemegang lesen tidak boleh serahhak atau pindahmilik, sama ada keseluruhan atau sebahagaiannya, mana-mana hak, kewajipan atau obligasi yang ditetapkan di dalam lesen ini.

24. Mana-mana pegawai awam yang dilantik oleh Menteri dengan sewajarnya, adalah berhak untuk menghadiri dan menyertai apa-apa mesyuarat atau urusan berkaitan dengan pertaruhan pool tersebut di atas yang dikendali atau dimajukan oleh pemegang lesen atau badan pengurusannya.

25. Menteri boleh pada bila-bila masa menambah, mengubah atau membatalkan apa-apa jua syarat atau sekatan yang tercatit di dalam lesen ini.

26. Menteri boleh pada bila-bila masa membatalkan lesen ini tanpa memberi sebarang sebab.

Diperbuat di Kuala Lumpur pada Januari 1995

(Signed)
(Yusof bin Salleh)
Setiausaha Bahagian Pentadbiran,
Bagi pihak dan atas nama,
Menteri Kewangan.

Correspondence then ensued between the parties which are, unless otherwise hereafter stated, not relevant for the consideration of the issues in this case. Sababumi was adamant and did carry on the off-course betting activities after 1 January 1995, and they only stopped after the police were brought into action as a result of a police report by the Club.

The Claim

It was against the backdrop of undisputed facts that Sababumi comes to Court and pray, *inter alia*, for a declaration that the licence dated January 1995 issued by the relevant authority to the Club under the Pool Betting Act, 1967, and any renewals thereof, is within the scope of the Agreement.

The Contentions

Mr. Roderic Fernandez submitted that the parties have entered into a long term, for at least 20 years, joint venture partnership in the construction of a race course and in the setting up and management of racing and betting facilities. He argued that within that 20-year period the exclusive right granted to Sababumi by the Agreement in connection with the gambling activities is only to come to an end if and when the Club itself ceases to have the right or licence to conduct and manage such gambling activities. He further argued that the Agreement merely describes the relevant legislation, which is the Gaming Ordinance, under which the right was conferred but that it is not the essence of the Agreement and therefore it does not matter whether the right comes from the Gaming Ordinance or any other legislation. Before proceeding to decide the issue, I will first remind myself of the relevant legal principles.

The Law and Conclusions

The approach to be adopted in construing an Agreement has been settled. The question to be answered is, as put by Lord Simon in *Schuler (L) AG v. Wickman Machine Tool Sales Ltd.* [1974] AC 235, approving a passage of *Norton on Deeds*, 2nd Edn., 1928 at p. 50,:

> ... 'What is the meaning of what the parties have said?' not 'What did the parties mean to say?'

Therefore, the parties cannot themselves give direct evidence of what their intention was (*Reardon-Smith Line Ltd. v. Hansen-Tangen* [1976] 1 WLR 989). In construing any written Agreement the Court is entitled to look at evidence of the objective factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction; however, this does not entitle the Court to look at evidence of the parties' subjective intentions. See *Lewison on Interpretation of Contracts,* at p. 44, para. 2.10, where various passages of various judgments are cited and I can do no better than just reproduce what is stated by the learned author, *viz.*:

> Accordingly, evidence of the surrounding circumstances is admissible in all cases to place the contract in its correct setting, even where there is no ambiguity apparent on the face of the document. Thus in *St. Edmundsbury Ipswich Diocesan Board of Finance v. Clark (No. 2)* Sir John Pennycuick, delivering the judgment of the Court of Appeal said it was contended:
>
> > that the proper method of construction is first to construe the words of the instrument in isolation and then look at the surrounding circumstances in order to see whether they cut down the *prima facie* meaning of the words. It seems to us that this approach is contrary to well-established principle. It is no doubt true that in order to construe an instrument one looks at the instrument and no doubt one may form a preliminary impression on such inspection. But it is not until one has considered the instrument and the surrounding circumstances in conjunction that one concludes the process of construction.
>
> So also in *Hvalfangerselkapet Polaris A/S v. Unilever Ltd.,* Lord Russell of Killowen said:
>
> > Before a Court begins to construe a written contract, it must know all the relevant circumstances which exist and are within the knowledge of the contracting parties at the time when they make their contract.
>
> A similar approach was adopted by Lord Wilberforce in his two speeches in *Penn v. Simmonds and Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen,* which are now the leading speeches expounding this principle. In the former case Lord Wilberforce said:
>
> > The time has long since passed when Agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic consideration ... We must ... inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object appearing from those circumstances, which the person using them had in view.
>
> He continued:
>
> > ... evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.
>
> In the latter case Lord Wilberforce said:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise; it can be illustrated but hardly defined. In a commercial contract it is certainly right that the Court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> He continued:
>
> > ... what the Court must do must be to place itself in thought in the same factual matrix as that in which the parties were.

As for the factual background, which the authorities, *supra*, mention, they are skimpy. It is not known nor explained why the share of the collections from the bets, apportioned at 2% to the Club and 98% to Sababumi, was worked out that way. Of course, the parties are deemed to know their own equilibrium when they struck the bargain. It is also not established what was the estimated cost to Sababumi to build a race course complex at or before the time of the execution of the Agreement. What is certain is that the Club, on its own, was not able to do so and was not able to run the gaming activities and hence, the Agreement with Sababumi. One other fact known to both parties before or at the time of the Agreement was that it is a condition of the licence that the public lotteries can only be promoted in conjunction with race meetings held by the Club. It is against this factual backdrop that the cold print of the Agreement falls to be determined, which is, what is the meaning of what the parties have said. Do the words in the Agreement then bear the meaning which Mr. Roderic Fernandez had argued, which is, it will be recalled, that as long as the Club is licensed, under whatever legislation it may be, Sababumi will continue to have the exclusive right to manage and conduct both the on-course and off-course betting for at least 20 years. I cannot find nor have Mr. Roderic Fernandez pointed to any word or words or sentence in the Agreement that is capable of being interpreted or construed in the manner urged by Mr. Roderic Fernandez. But learned Counsel did submit that such a term ought to be implied to give it business efficacy. Mr. Valentine Willie, Counsel for the Club, argued that a term will not be implied to contradict an express term (*Halsbury's Laws of England*, 4 Edn., Vol. 9, at para. 356). It is to this issue of whether there is any contradiction of any express term that I will now turn to. Mr Valentine Willie's argument is that if the term, advocated by Mr. Roderic Fernandez, is to be implied it would contradict the express term in the Agreement that a licence shall mean the licence issued under the Ordinance and the importation of such a term would mean that the licence would include a licence under the Pool Betting Act, 1967, which is a contradiction of the defined term of licence under the Agreement. It has to be appreciated that the Agreement is premised entirely upon the exemption and the licence granted under the Ordinance and all references to the word "licence" was clearly defined by the preamble, *supra*, to mean the licence granted under the Ordinance. This is even made more clear in cl. 11(ii) of the Agreement, *supra*, where the licence was referred expressly to as the one issued under the Ordinance. But all that cl. 11(ii), *supra*, provides expressly is that where the licence is cancelled, Sababumi is still entitled to operate and manage the ponies and thoroughbred horses racing on the race course and there is no express provision that Sababumi is not to have any more right in the event that the licence is replaced by another one which enables the Club to carry on the gaming activities. There is no express provision providing for the situation, as in the present case, where the licence issued under the Ordinance was cancelled and another one issued under the Act which enabled the same gaming activities to be continued immediately after the effluxion of the licence issued under the Ordinance. Since there is no such express provision, how can the imputation of a term, if it can be imputed, be said to be contrary to an express term. I am, therefore, unable to agree with Mr. Valentine Willie that Sababumi could not even cross this first hurdle prohibiting the importation of a term that contradicts an express term because there is no such express term. The issue is not whether the word "licence" used in the Agreement linguistically includes a licence issued under the Act but rather, whether the Agreement made provision for the eventuality of the licence under the Ordinance being cancelled and then replaced by one issued under the Act. It does not appear from the Agreement that the parties have reduced into writing what the position would be in such eventuality as had happened. The provision, cl. 11(ii) of the Agreement merely postulates the eventuality of the licence being

cancelled and it does not go further to make provision for the eventuality of a cancellation and then another licence being issued under another legislation to allow the Club to carry on, uninterrupted, its previous gaming activities.

I will turn now to the issue whether the said term ought to be implied. I will first summarise the various statements of law in this regard and which are not disputed. The first of a number of cases cited by Mr. Roderic Fernandez was *Reigate v. Union Manufacturing Company (Ramsbotton), Limited and Elton Cop Dyeing Company, Limited* [1918] 1 KB 592 and particularly the judgment of Scrutton LJ at p. 604 where he said:

> The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some had said to the parties, "What will happen in such a case," they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear."

This test to be applied is described in *Shirlaw v. Southern Foundries [1926] Limited* [1939] 206, at p. 227, per Mackinnon LJ, this way, *viz.*:

> *Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain an officious bystander were to suggest some express provision for it in their Agreement, they would testily suppress him with a common 'Oh, of course!'

Though not disputing the legal principles of the authorities cited by Mr. Roderic Fernandez, Mr. Valentine Willie cited his as well and one was *Halsbury's Laws of England*, 4th Edn., Vol. 9, para. 356 which says:

> **356. Determining whether term is to be implied.** If there is any reasonable doubt whether the parties did intend to enter into such a contract as is sought to be enforced, the document should be looked at and all the surrounding circumstances considered; and, if the document is silent[1] and there is no bad faith on the part of the alleged promisor, the Court "ought to be extremely careful" how it implies a term[2]. It is not enough to say that it would be reasonable to make a particular implication[3]; nor that it would make the carrying out of the contract more convenient[4]; nor that it is consistent with the express provisions[5]; nor will a term be implied where a contract is effective without the proposed term[6].
>
> Whether a term will be implied is a question of law for the Court[7]. A term will not be implied so as to contradict any express term[8]; and, in fact, a term ought not to be implied unless on considering the whole matter in a reasonable manner it is clear that the parties must have intended that there should be the suggested stipulation[9]. The Court has no discretion to create a new contract[10]. Where a contract contains an express obligation by a party to the contract, it is for that party to show that there is some implied term which qualifies the obligation[11].

Both learned Counsel had also adverted to the conduct of the parties many years subsequent to the Agreement, like the words used in correspondence, as being relevant in construing the Agreement, I am of the opinion that this cannot be done as it is the law that an Agreement cannot be construed by reference to the subsequent conduct of the parties (see *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.* [1970] ALL ER 796 followed in *Kassim bin Sulong & Anor. v. Guthrie Estates Holdings Ltd. & Ors.* [1993] 3 MLJ 303) unless the Agreement is partly written and partly oral, which is not the case here, subsequent

conduct may be examined for the purpose of determining what were the full terms of the contract. (See *Lewison on Contract*, p. 48, para. 2.11.) Having apprised myself of the law, I will now turn to the various contentions regarding whether the term ought to be implied.

Mr. Valentine Willie, adopting the officious bystander approach, had postulated the following questions and submitted what the answers to them would be, *viz.*:

i. Was horse racing an integral part of the Agreement? Yes, so much so that cl. 11(i); 12(i) and 13(i) specifically provides that if the Exemption [under which the plaintiff was authorised to conduct the races], is cancelled for any reason whatsoever, be it the fault of STC or the plaintiff themselves or no one's fault at all, the entire "Agreement shall be determined." Thus it is clear that without the horse races, the whole Agreement shall be terminated.

ii. Was cancellation of the Gaming Licence contemplated? Of course. Cancellation was very much on the mind of the parties, so much so that every cause of cancellation was elaborately and succinctly provided. Clause 11(ii) expressly states that if the Licence is cancelled through no fault of either party, then the plaintiff will cease all off-course 4-D betting throughout Sabah but are still entitled to conduct races and on-course betting under the Exemption.

iii. Does the Agreement expressly define the words "the Licence"? Yes. The Agreement narrowly defines "the Licence" as "the licence under the Gaming Ordinance" and did not specify saving provisions such as "or any replacement thereof under any other enactment". Such a general or wide definition was specifically left out because it was not the intention of the parties to have such a wide definition. Given the tenor of the Agreement, it certainly cannot be implied. Further, in Exhibit A7 of the plaintiff's Affidavit, the plaintiff as late as 14 January 1994 stated that "We are of the view that **as long as there is in existence a valid licence issued under the Gaming Ordinance Cap. 50 Sabah** which permits the STC to promote and organise public lotteries (including 4-D), cl. 11(ii) of the Agreement has no application and the parties must continue to observe and perform the terms and conditions of the Agreement."

iv. Would STC have required the plaintiff to build a modern racecourse had there been no such legal requirement specified in the Gaming Licence? Obviously NO!

v. Would the plaintiff or STC have agreed to enter into 20 years lease for the racecourse if they had known that the Pool Betting Licence will be valid for only one year instead of the unlimited term of the Gaming Licence? Probably NO!

vi. Did the parties contemplate a situation where the Agreement would continue and subsist with the Exemption under the Gaming Ordinance and the Licence under Pool Betting Act? Obviously NO!

vii. Assuming the Gaming Licence is replaced by the Pool Betting Act, can the Agreement be said to be certain and enforceable without additional provisions on:

Who is to pay the Licence Fee of RM250,000?;

Who is responsible for the Security Deposit of RM1,000,000?;

Who is to pay the agency fee of RM60,000 agent's fees?;

Will STC's share of gross income still be limited to 2% or should that be re-negotiated in view of the fact that draws may be mechanically drawn and that there will be no need to complete and maintain an expensive and modern racecourse?

and he went on to contend that the said term should not be implied. I will deal with the argument in the order they have been advanced. As for i, there is no dispute that horse racing is essential because the objects of the Club enshrined that purpose. In fact, and I am

in full agreement with Mr. Roderic Fernandez, that all gaming activities must be conducted in relation to racing done on the course of the Club. Be that as it may, I do not see how this fact can support the contention of the Club that a term cannot be implied. As for ii and iii, they again do not constitute grounds and do not matter in deciding whether the term ought to be implied. There is no dispute that cancellation of the licence issued under the Ordinance was in the contemplation of the parties but that is not the issue. As I have said earlier, the issue here is the combined effect of the cancellation of the licence issued under the Ordinance and the issuance of a licence under the Act which eventuality is not provided for under the Agreement. As I have also said earlier, we are not concerned with the definition of the word "licence" because it is clear that the word used in the Agreement refers to a licence issued under the Ordinance but that is not the issue. As for the letter issued by Sababumi on 14 January 1994 (Exhibit A7), it cannot be used to construe the Agreement (see *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.; Kassim bin Sulong & Anor. v. Guthrie Estates Holdings Ltd. & Ors., supra)*. In any event, it has no relevance when considering whether to imply the said term save for the purpose of determining whether there was bad faith in the action of the parties. As for iv, I do not see how it can be argued that the Club would not have required the building of a modern racecourse if the licence issued under the Ordinance did not require it because it is their objective, as stated in the rules and constitution of the Club, to have such a race course. Can anyone imagine a turf club not having and not wanting a race course. I therefore cannot agree with Mr. Valentine Willie that if not for the condition in the licence issued under the Ordinance, the Club would not have required Sababumi to build the race course. The race course has to be built because that was the main, if not the only, objective of forming the Club irrespective of whether the licence issued under the Ordinance stipulated for one. As for v, it is premised on the wrong assumption that the licence issued under the Ordinance is for an unlimited term. Any licence issued under s. 27 of the Ordinance may be revoked or amended at any time as events had turned out. The uncertainty of the duration of the licence issued under the Ordinance must surely have been uppermost in the mind of the parties when they made all the relevant contingency provisions in the Agreement. Then again, the licence issued under the Act, which is renewable, puts it on par with that issued under the Ordinance. There is no difference in the life span of the licence issued under the Ordinance and the one issued under the Act because both are terminable at any time and both carry with them the expectation of the renewal. Therefore, even if Sababumi had known the licence is for one year they would still have entered into the 20 years lease for the race course because the Club did not have the money to build the race course and its related building and by entering into the Agreement, the Club gets not only a race course and its related buildings but cash, to the tune of 2% gross of all bets placed, on top as well. As for vi, the simple answer is that the parties were not concerned at all where the licence should come from and under which legislation it should issue. All they were concerned was that there must be in existence a licence for them to carry out the gaming activities. That must have been in their contemplation. Therefore, it is irrelevant, as far as the parties are concerned, whether the permission to carry out gaming activities should come partly from the Ordinance and partly from the Act because all they were concerned was that there should be a licence, from whatever source, to legally carry out gaming activities. It was then urged, vii, that the term should not be implied because the licence issued under the Act contains financial burden which the Agreement did not state who should shoulder them and these are, the licence fee of RM250,000, the security deposit of RM1,000,000 and the agency fee of RM60,000 per agent. Mr. Roderic Fernandez replied, and I agree with him, that all these are provided for under clauses 9, 18 and 19 of the Agreement, *viz*:

9. In carrying out all 3-D, 4-D and other betting operations whether on-course or off-course, the Company, its agents and employees shall at all times comply with the laws for the time being in force in Sabah, and the terms and conditions set out in the licence granted to the Club and with all orders and directions which may be issued by the licensing authority or the Police from time to time. In the event of any default or offence being committed, the Company shall pay and settle all fines or penalties which may be imposed and indemnify and keep indemnified the club its officials and members against the same.

...

18. The Company shall at all times pay all Government duty and gaming tax which may be imposed or assessed by the authorities concerned on the racing and betting operations, and indemnify and keep indemnified the Club, its officials and members against the same.

...

19. The Company shall not involve the Club in any financial liability whatsoever while in the development of the race course or in the subsequent management of the race course and racing and betting operations. Any loan obtained for the development shall be the sole liability of the Company.

If cl. 9, *supra*, alone is insufficient to attach liability on the part of Sababumi to make payment of the moneys referred to earlier as the licence fee, security deposit and agency fee, then clauses 18 and 19, *supra*, read together with cl. 9 would surely put the matter beyond doubt. It was also argued that the licence issued under the Act did not require the draws to be in relation to the races to be held on the race course and therefore dispensed with the requirement of a race course which in turn would have made it unlikely for the Club to agree to share in only 2% of the gross earnings. The underlying supposition of this argument is that the Club does not require such a race course because the draw can be made mechanically and need not be in reference to the races conducted on the race course of the Club. This is an untenable position. The Club when it wanted to be registered as a society under the Societies Act, 1966, had proclaimed to the world through its constitution that it wanted to promote horse racing and for that purpose to buy land and to build a race course, stands and other related structures. It must have been the reason that horse racing will be conducted that had induced the issuance of the exemption and licence under the Ordinance. How can the Club now turn round to say that they would never have wanted the race course built if lottery draws can be conducted mechanically? The answer is the Club, it can be assumed, would never have gotten the licence under the Ordinance if not for the representation that it was promoting horse racing on its own race course. In any case, it is not the factual background that the Club can conduct draws mechanically. Therefore, I am of the view that, whether the draw would be made mechanically or in relation to races conducted on the race course of the Club, the race course would still have to be built to achieve the objects of the formation of the Club and the race course would sustain or justify the reason for the grant of the licence to the Club. Therefore, none of the reasons so far advanced by Mr. Valentine Willie stands in the way of implying the said term. Since the burden is on Sababumi to satisfy the Court that the said term, which is that as long as the Club is licensed, under whatever legislation it may be, Sababumi will continue to have the exclusive right to manage and conduct both the on-course and off-course betting for at least 20 years, the Court must still be satisfied that there is nothing else to prohibit the importation of such a term.

By citing *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board* [1973] 2 ALL ER 260, I take it that Mr. Valentine Willie is urging the Court to conclude that the term sought to be implied is not necessary for business efficacy and therefore, ought not to be implied. This is what Lord Pearson said at pp. 267-268:

> Faced with the conflict of judicial opinion in this case, I prefer the views of Donaldson J and Cairns LJ as being more orthodox and in conformity with the basic principle that the Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The Court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the Court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the Court finds that the parties must have intended that term to form part of their contract: it is not enough for the Court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.

Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board deals with a building contract where the date for completion of phase III is clearly stated and free from ambiguity and which is "30 April 1972" and the Court there refused to imply a term to extend the time for the completion of phase III on account of delay in the construction of Phase I (which time was extended by the architect) and the Court there held that the parties had taken into account the possibility of the overrun of phase I curtailing the time for phase III. In our case, though the contingency of a cancellation of the licence under the Ordinance is provided, there is no provision made where the licence under the Ordinance is cancelled but another one issued under the Act in its place. The facts of *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board* are therefore vastly different from that of the present case. The Court was then referred to the case of *Yap Nyo Nyok v. Bath Pharmacy Sdn. Bhd.* [1993] 2 MLJ 250 which contains very useful references to various cases relating to the principles of law on implying a term in an agreement which principles, as I have stated earlier, there is no dispute. In *Yap Nyo Nyok v. Bath Pharmacy Sdn. Bhd.* the Court refused to imply a term that a party had a right to terminate a tenancy for a fixed term which facts are also different from our present case. Even though the Club was not able to persuade the Court to accept their argument why the term ought not to be implied it remains to be decided whether Sababumi has satisfied the onus of proving that the term ought to be implied (*Smith v. Harwich (Mayor)* [1857] 2 CB (NS) 651, applied in *Yap Nyo Nyok v. Bath Pharmacy Sdn. Bhd.*). For this purpose, a little of the facts have to be repeated and elaborated.

The Club was formed on 25 November 1983, and the exemption and licence under the Ordinance to enable the Club to carry out gaming activities were issued less than three months later to the Club on 14 February 1984. Despite that, the Club did not, to use the words of the Club, "exploit the opportunities available" until they entered into negotiations with Sababumi (the details of which we are not told) which resulted in the Agreement of 26 November 1987, almost four years after the Club had obtained the said exemption and licence. Again we are not told why it took about 4 years for the Club to finally "exploit the opportunity" though it is known that the Club was financially unable to construct a race course. On 26 November 1987, both the Ordinance and the Act were in force and applicable to Sabah. It will be recalled that the objects of the Club, *inter alia*, were to promote horse and pony racing and to build its own race course and its related structures. The exemption and licence issued under the Ordinance contains a provision that gaming must be conducted in relation to the races to be held on the race course of the Club. It was against this factual background that Mr. Roderic Fernandez urged the Court to imply the term and learned Counsel referred to cl. 3 of the Agreement which says:

3. The club hereby undertakes with the Company as follows:

(a) To grant to the Company the exclusive rights to run all the pony and thoroughbred horse racings on the said race course.

(b) To grant to the Company the exclusive rights to conduct and manage all bettings in the races at the race course and to conduct and manage all 3-D and 4-D operations related to such races throughout the State of Sabah.

(c) To sublease the said Land to the Company for a term of twenty (20) years commencing from the date of completion of the race course thereon, at the nominal annual rent of Malaysian Ringgit One only (RM1), for the purposes set out in paras. (a) and (b) aforesaid.

(d) ...

and submitted as follows:

5. The essence of the Agreement and the intentions of the parties are aptly summed up in clauses 3(a), (b), (c) thereof, whereby Sababumi was granted the exclusive right on behalf of STC to conduct and manage all 3-D and 4-D operations related to the races at the race course for a period of at least 20 years and a 20 years sub-lease of the land on which the race course was to be construed was to be granted to Sababumi for, *inter alia*, that purpose.

6. Clearly, within the said 20 year period, that exclusive right given to Sababumi was only to come to an end if and when STC itself ceases to have the right or licence to conduct and manage such 3-D or 4-D operations.

7. The essence and subject matter of the Agreement concerned STC's own right to manage and conduct 4-D operations related to horse racing. Whether such right of STC was pursuant to the Gaming Ordinance or, after the repeal of the Gaming Ordinance, any other equivalent legislation was not of the essence of the Agreement. The Act under which the licence was granted to STC was merely stated in the Agreement as being descriptive of the legislation under which STC had, at the material time, been granted the right to promote and conduct 4-D operations.

Mr. Valentine Willie replied that the exclusive right and its duration is subject to the currency of the duration of the licence issued under the Ordinance and that the 20-year lease can still continue and this has been provided under clauses 11(ii), 12(ii) and 13(ii) of the Agreement. The argument of Mr. Valentine Willie is untenable for the following reasons. The construction which learned Counsel urged the Court to accept does not take into account all the relevant circumstances which existed and were within the knowledge of the contracting parties (*Lewison on Interpretation of Contracts, supra*) and these are the Club's objectives of promoting horse racing, building its own race course, the inability of the Club to construct such a race course for a number of years before the Agreement was signed and the condition in the licence that races must be held on the race course of the Club. It was under those circumstances that the Agreement came to be entered and they must be taken into consideration when construing the agreement. The licence issued under the Ordinance only permits gaming based on races held on the race course of the Club. The Club was in need of money to construct the race course and its related structure and it was almost four years later that they were able to enter in an agreement to have someone build the race course and organise the gaming activities for them. Given these circumstances, if the licence under the Ordinance had been cancelled say, one month after the Agreement had been executed and a licence under the Act had been issued to enable the Club to carry out the same gaming activities as permitted under the Ordinance and Sababumi, discovering on hind sight that it

is not profitable to carry through with the Agreement, had wanted to terminate the Agreement on the ground that the licence issued under the Ordinance had been cancelled, the Club would without doubt say to Sabubumi: "You cannot do that, you have undertaken to construct the race course and the related structures for us and give us 2% of the gross revenue; it matters not that the licence had been cancelled since another one is issued in its place". The Club would say that because at that time the Club would still be in the same dire financial situation as it was just before they signed the Agreement. They would say that also because at that time they would want Sababumi to build the race course and the related structure since the very existence of the Club would depend on it having a race course and the related building. Similarly, Sababumi would be able to say to the Club that they are bound by the Agreement irrespective of whether the licence which the Club held is one issued under the Ordinance or under the Act. But Mr. Valentine Willie had argued that the licence issued under the Act does not prescribe that races must be held at the race course of the Club before the lotteries can be conducted and therefore, if the licence under the Act was issued before the execution of the Agreement, they would not have any need to build a race course and therefore the Club would not have entered into an agreement to have the race course built; and thus the term could not be implied. Mr. Roderic Fernandez riposted, effectively I would add, that whatever the licence under the Act may permit, the constitution of the Club, *supra* does not allow the Club to organise gaming activities other than based on the races of the Club and if the licence under the Act permits lotteries other than based on the races conducted on the race course of the Club, then this was engineered by the Club since the Club had submitted a scheme to allow for the lotteries to be conducted other than in accordance with races held on the race course and this, according to learned Counsel, is against the constitution of the Club. Mr. Roderic Fernandez added, and I agree, that was done to create an excuse for termination of the exclusive right of Sababumi which, I would add, the Club had attempted once before when the licence under the Ordinance was amended. It is clear to me to accept the argument that the licence under the Act permits lotteries other than based on the races conducted on the race course would be to allow the Club to set up its own breach of the constitution of the Club and thus to rely on its own wrong to interpret the Agreement. This is not allowed (*Chitty on Contracts*, 26th Edn, Vol., at para. 1681). The issue was put differently, but having the same result, by Mr. Roderic Fernandez in this way. Learned Counsel said that the difference between the licence under the Ordinance and the one under the Act was "a self-induced difference engineered by STC to circumvent its contractual obligations to Sababumi under the Agreement" and he referred to *Southern Foundries [1926], Ltd v. Shirlaw [1939] 2 KB 206* which approved the following passage of Gockburn CJ in *Stirling v. Maitland* 5 B & S 840, 852, *viz*:

> I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative. I agree that if the company had come to an end by some independent circumstance, not created by the defendants themselves, it might well be that the covenant would not have the effect contended for, but if it is put an end to by their own voluntary act, that is a breach of covenant for which the plaintiff may sue.

Therefore, the fact that the licence under the Act does not prohibit lotteries based on results other than those of races cannot be taken into consideration when deciding whether to impute the term. It was also argued by Mr. Valentine Willie that neither the Club nor Sababumi would have entered into an agreement on the terms of the Agreement if the licence issued under the Ordinance had not made pony and horse races a specific prerequisite to the 4-D

draws. This was earlier dealt with but I repeat what I have said earlier with a little elaboration. That is not the factual background of this case. The facts, to again repeat, show the Club was established on 25 November 1983, to promote horse and pony racing and to construct a race course and its related building. Just under three months thereafter, the exemption and the licence under the Ordinance were issued. The reason why this Club was given the exemption and licence under the Ordinance was not stated and neither was the application by the Club for the exemption and licence produced but I think it is safe to conclude that it must have been because the constitution of the Club provides for the promotion of horse and pony racing and for the construction of a race course that the exemption and licence were issued and contains the condition that public lotteries must be promoted and organised in conjunction with race meetings to be held by the Club. As I have said earlier, those objectives form the very basis for the existence of the Club and, I am entitled to infer, for it to be granted the exemption and licence under the Ordinance. Thus, I cannot envisage a situation where the Club is not going to hold races on its race course nor the situation where the exemption or licence under the Ordinance would not contain such a provision for the lotteries to be conducted in conjunction with the races to be held on the race course of the Club. It did not happen and, for the reasons I had stated, cannot happen at the time the Agreement was signed. Therefore, it is pure summation and not based on the factual background, that the parties would not have entered into the Agreement if the exemption and licence under the Ordinance had not provided for the public lotteries to be held in conjunction with races to be held on the race course of the Club. Such a situation did not arise and, for the reasons I have stated, could not have arisen and does not call for consideration. It was also argued by Mr. Valentine Willie that the Court cannot imply a term into the Agreement which would create an inconsistency with the express language of the bargain, citing *Lynch v. Thorne* [1956] 1 All ER 744, and, learned Counsel continued, to imply that the licence issued under the Ordinance to include the licence issued under the Act would directly contradict the very foundation of the Agreement and in particular the expressed definition of the Agreement and clauses 11, 12, and 13 thereof. *Lynch v. Thorne* is concerned with an agreement for the sale of a plot of land and for the vendor to complete a building in accordance with the scale plan and specification appended to the agreement. It was said in that case that generally, the law of England has been that there is no warranty in a sale of land with a house on it that the house is habitable but one exception is where the sale of the land includes a covenant or obligation to build or complete a house, in which case, a term will be implied that the house shall be completed in such a way that it is fit for human habitation in the absence of express contract as to the way in which the house is to be completed. This exception which permit for the term of habitability to be implied was held not to apply in that case because the house was built exactly in accordance with the drawings and specification. The facts of our case are vastly different. Not only that, learned Counsel had sought, in this instance, to argue the matter by merely referring to the meaning of the word "licence" but what we have to decide is the situation where the licence has been cancelled and another licence takes its place and thus permitting the Club to continue with its gaming activities uninterrupted. This situation had not been provided for under the Agreement and thus the resolution of this issue cannot be looked at by purely establishing the meaning of the word "licence" without reference to the factual background which I have set out and the objective of the transaction.

Given what I have said thus far, I am of the view that the said term ought to be implied but Mr. Roderic Fernandez went further and said, because of bad faith on the part of the Club, the Court should more readily impute the term against the Club and learned Counsel referred to *In re Railway and Electric Appliances Company.* [1888] 38 Ch D 597 where it is said:

> Much the safest rule in such cases, in my opinion, to follow, when there is any reasonable doubt whether the parties did intend to enter into a convenant such as is sought to be implied here, is to look at the deed and at the circumstances under which the deed was made, and if you find that there is no such convenant in the deed, and there has been no bad faith on the part of those against whom it is sought to imply such a covenant, the Court ought to be extremely careful how it implies such a convenant in a well-considered deed, when there are no words whatever which express that convenant in any way.

Learned Counsel argued that the Club had put forward a scheme for public lotteries, not based on races to be held on its race course, which was against its own constitution which clearly demonstrates bad faith on the part of the Club and the Court should, under the circumstance, imply the said term. The evidence clearly shows that the Club had wanted to take over the off-course betting as far back as 7 January 1994, when the Club, through its erstwhile advocates, attempted to rewrite the terms of the Agreement but this was quickly rebuffed. The Club, it can safely be assumed, was unhappy with the 2% share of the gross taking. The excuse then given was that the licence under the Ordinance was cancelled and that the amended licence, issued on 14 April 1992, does not permit any transfer of this amended licence and this, according to the Club, would prevent the granting of the exclusive right to Sababumi under the Agreement. This letter only came some 21 months after the amended licence was issued and which cancelled the previous licence. What it shows is that the Club is trying to find every means possible to get out of the Agreement after the race course and its related building had been substantially constructed and, more importantly, after it became apparent that millions and millions of ringgit stood to be earned from the punters. The Club was very much motivated by the very large sum that it stood to gain by the termination of the Agreement or part thereof concerned. It had mounted its failed campaign on 7 January 1994, and the latest campaign must, for the reasons I have given, also fail and which in any event would fail independently of bad faith on the part of the Club.

There were other grounds advanced by Mr. Valentine Willie against the importation of the said term. Learned Counsel submitted that to imply the term would be to contradict ss. 92 and 94 of the Evidence Act, 1950, which disallow evidence to contradict the terms of the Agreement and he also referred to *Tindok Besar Estate Sdn. Bhd. v. Tinjar Company.* [1979] 2 MLJ 229, 233, where Chang Min Tat FJ said:

> ... it would be open to any party to a litigation concerning an agreement to say that the agreement which is the subject matter of the dispute, did not contain all the terms thereof and to seek to introduce such terms or even terms which might or even have been within the contemplation of the other party. No agreement would then be safe from being rewritten by one party in a Court of law.

The position that pertains in this case, I repeat, is that there is no express provision governing the position where the licence under the Ordinance is cancelled and another one issued under the Act which has the effect of allowing the Club to continue, uninterrupted, its gaming activities. I therefore do not see the relevance of ss. 92 and 94 of the Evidence Act, 1950. As for *Tindok Besar Estate Sdn. Bhd. v. Tinjar Company*, the Court there recognised that the proviso to s. 92 allows for the admission of a separate oral agreement which the document is silent and which is not inconsistent with its terms. So, that case is of no assistance to STC's case.

I therefore grant the declaration sought by Sababumi that the licence dated January 1995, bearing the reference KK/BP(J)/8.00/4/3/3-1 JD.1(4) and issued by the Finance Minister of the Government of Malaysia to the Club under the Pool Betting Act 1967, and any renewals thereof, is within the scope of the Agreement made between Sababumi and the Club dated

26 November 1987. This means the Club was and still is in breach of the provision of the Agreement that confer exclusive right on Sababumi to conduct and manage all 3-D and 4-D operations in Sabah. An injunction has been prayed for to prevent the continuing breach. I will now consider whether I should grant the injunction. For this purpose some additional facts have to be stated.

Sababumi had, pursuant to the Agreement appointed 120 agents but this was later reduced to 60 agents and these agents had, as a result of purported termination by the Club of the exclusive right of Sababumi, ceased to carry on their business. In their place, the Club had appointed another 60 agents and they had since been operating and these 60 agents were appointed after they were approved by the Finance Minister, which is a condition of the licence issued under the Act to the Club. As I said at the outset of this judgment, this case is all about ringgit which is easily quantifiable in the present case. It is a notorious fact and I can take judicial notice that the Government of Malaysia wanted nothing to do at all with gaming in so far as that is possible. That was why the govenment decided not to conduct the lottery tickets themselves. But, simply abandoning gaming would mean leaving it to the realm of the under-world. Instead of that, the government decided to let another group of people in the country run gaming activities legally but the government still shows its disdain for gaming and that is why all betting ticket must bear the words that gaming is illegal under the Islam religion. It can be accepted that generally, the culture of all the races in Malaysia eschew gaming. What is the attitude of the Court then towards gaming? Without doubt, the Court should show the same attitude of disapproval as that shown by the government and by our society. Therefore, the Court must not do anything that can be interpreted as sanctioning or approving gaming. I am of the view that granting an injunction may convey that impression. Slowly and imperceptibly, society has been asked to take a softer and more charitable stance to many social ills like drinking, smoking and gaming because those in the alcohol trade are helping raise funds for education, those in the cigarette trade are sponsoring sporting events and those in gaming activities are giving donations to charities. Now the Court is asked to give sanction to gaming by the issue of an injunction. I am not prepared to do that. Therefore, I decline the issue of an injunction. Another reason for refusing the injunction is that this is a case where the damage to Sababumi is easily quantifiable as accounts must be kept of every single bet for the purpose of the payment of government taxes and it is from those figures also that whatever damages can be computed, if that is the method of the computation of damages and which issue remains to be resolved at the hearing of the assessment of damages. The final reason for refusing the injunction is that the agents must have the prior approval of the Finance Minister which approval was not sought and therefore not granted to the former 60 agents. An injunction may appear to dictate to the Finance Minister how his discretion ought to be exercised - this the Court will not do.

In the premises, I order damages to be assessed by the Senior Assistant Registrar of the High Court, Kota Kinabalu. How the damages are to be assessed is still open for argument. There will be costs to Sababumi to be taxed.